

Analysis Of Prenuptial Agreement Provided by Albanian Legislation

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Abstract

This paper carried out the framework reform of the Institute of marital property regime and marriage contract in Albania. The marriage contract is one of the most important innovations that the new Family Code of 2003 has introduced, anticipating the possibility that spouses are regulating marital property regime.

Provisions regulating marriage in the Family Code provide undeniable autonomy of spouses especially in regulating property relations between the spouses. This is seen as an innovation since in the past this autonomy was categorically excluded.

Due to the social importance of the family and to balance the private interests of spouses in the public interest, the autonomy of spouses in regulating the marital property regime is limited compared to the other contractual relations.

The paper analyzes problems such as: the implementation of the principle of autonomy of will in regulating interpersonal relations; implementation of the Civil Code and Family Code norms on the marriage contract; essential conditions for the validity of the marriage contract; contractual property regimes; prenuptial agreement; community property regime and the separation property regime, with the focus on the legal advantages and disadvantages of each regime.

At the end of the study, you can find a presentation of all the findings and conclusions reached during the analysis of the above issues, as well as some recommendations for improving the articles of the Family Code, which we hope may be useful for scholars, students and for anyone who wants to get some information about this field of study, and finally especially for those who have decided to marry. The latter is more interested in being informed about a prenuptial agreement.

Keywords: party autonomy, marriage, matrimonial property regime, marriage contract, prenuptial agreement, community regime, separation property regime, *pasta sund servanda*.

Introduction:

The most of the contracts in Albania are governed by the Civil Code, but despite this, because of the special characteristics that the marriage contract has, it is subject to the special provisions that the Family Code has foreseen for it. The marriage contract is regulated by the Family Code and is a legal action that has effects for both spouses because by its affiliation both husband and wife become subjects of rights and obligations between them, which they are obliged to enforce, as in any other contract, as well as the marriage contract, the principle *pacta sunt servanda* (agreements must be kept) – which means that the contract has the power of the law to the parties (spouses).

This marriage contract (*prenuptial agreement*) is a legal action through which the spouses establish their property regime during the marriage. Parties to this contract create marital property regime or, as the case may be, change or extinguish the regime that has existed since the marriage bond. The prenuptial agreement is considered as an aid instrument that allows spouses to choose between models of property regimes or to change them in accordance with the criteria provided for by law and family interests. According to doctrine is also considered as a solemn act, complex and a statute for the future family. (Mandro, 2009: 321) It is complex because the purpose of the agreement is to determine the property regime to which the property of the spouses will be subject to it and whatever the property regime the parties choose, the definition of each aspect and the regulation of any element of property relations between the spouses could not make its non-complex content.

Since the Family Code gives priority to the marriage contract (Family Code: Article 66) as the most appropriate instrument to regulate the spouse's property regime, should everyone have a prenuptial agreement?

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A premarital agreement is a written contract created by two people planning to be married. This agreement typically lists all the property each person owns, as well as their debts, and it specifies what each person's property rights and obligations will be after they sign the contract. Premarital agreements often specify how the property will be divided and whether spousal support will be paid in the event of a divorce. Only the existence of a definite prohibition can expressly limit the autonomous of the spouses will in the field of family relations regulation that brings as a consequence the invalidity of the marriage contract.

The decision to have a prenuptial agreement or not is a personal decision; it should always be both spouses will in order to conclude this contract. Each couple is unique, and everyone has to base their own decision by his or her unique circumstances. First of all, it is better to consider the advantages and disadvantages of prenuptial agreements and decide whether a prenuptial agreement is a right thing.

An analysis of the advantages and disadvantages would be needed to reach a conclusion whether a prenuptial agreement is necessary or not for future spouses.

The documentation of each spouse's property to protect personal wealth. Each of the spouses preserves the independence of its ownership, including the right to administrate, use and dispose freely of his property.(Family Code: Article 70&115) Although the assets are separate, this should not affect the cohabitation of the spouses and the fulfillment of the family obligations.

The difference between what is marital and what is community property. So the agreement will be provided clear what property is part of marriage, and what is the personal property of each spouse. This is positive because it cannot create misunderstandings or mix the assets.

Obtain detailed documentation in any particular agreement between spouses. The written act gives legal value to any kind of agreement, so the form required by the Family Code is a notarial agreement form. "Prenuptial agreement be notarized in the presence and with the simultaneous approval of both future spouses or their representatives"(Family Code: Article 69/2). According to the Italian doctrine, the explanation that appears to be more reasonable for this legal requires is the protection that the legislator provides to the community's legal regime, considering it the most appropriate regime for maintaining the balance of the interests of spouses and the family. The form importance is for the clarity and legal certainty of the prenuptial agreement in order to decrease the risk of its invalidity and to reduce the future litigation for the parties.(Dethloff, 2011: 88-89)

Avoiding prolonged court proceedings, which affect the attorney's bills of divorce to be more expensive. As mentioned above, if a prenuptial agreement is valid, the spouses have made the division of their property. In the case of marriage settlement, the court has the same division of property as this has been decided by the spouses in advance in the prenuptial agreement. In this case, the attorney costs will not be so expensive because the issue is more simple to solve. In a recent survey of members of the American Academy of Matrimonial Lawyers, 73% of divorce attorneys reported an increase in prenuptial agreements during the past five years.²

Considering that the prenuptial agreements carry a lot of benefits, there are some downsides that everyone should consider before creating one.

There may be state laws that cover all of the issues you want to address, without a prenuptial agreement. Regarding the property of the legal community regime, spouses may decide to apply the principle of joint administration to all ordinary or unusual administration actions, and vice versa is prohibited by law.(Terre/Slimmer, 2015: 137) So when spouses have not chosen a prenuptial agreement, the property will be divided according to the legal community regime, which presumes equal shares. This means that if the spouses agree to the provisions of the Family Code for the legal community regime, they do not need a prenuptial agreement.

A prenuptial agreement cannot include child custody issues. Only the court is the one who has the final say on the issue of children in a marriage settlement. The main factor that determines child support is based on "best interest of the child" standard. (Convention on the Rights of the Child, 1990 : 3)

A prenuptial agreement cannot include personal preferences, such as where to spend the holidays, or what school the children should attend. Prenuptial agreements are designed to address financially based issues.

² <http://www.familylawweek.co.uk/site.aspx?i=ed66543>

The prenuptial agreement includes only the marital property regime determined by the spouses and the manner of the division of the property for which the parties have agreed.

During the prenuptial agreement analysis, it is not possible to keep an upright position whether or not this contract should be made by the spouses because every situation is specific.

The prenuptial agreement should not be seen as a tool where one spouse decides its own interests as a priority. This is not allowed because none of the spouses can be privileged or the contract may be invalid. The reasons for which the contract is concluded are subjective elements; they represent the personal reasons that push the spouses to sign a prenuptial agreement. (Omari, 2008: 113) In a married couple, there must be fairness, reciprocity and equal opportunities for both spouses. Generally, the contractual regime, also based on world experience, is a regime preferred by those who have a prominent economic status and well-being. This regime applies from those arising from a previous marriage, and the legal community regime has not been favorable to the property consequences of the marriage settlement. In fact, the option of the contractual regimes is statistically more likely to be found in the middle or higher families of the bourgeoisie or in the women with economic autonomy. (Galgano, 1997: 2006)

The prenuptial agreement is a legal action through which the parties (spouses) determine their property regime mainly for the entire duration of the marriage. Parties to this contract create marital property regime or, as the case may be, change or erase the regime that has existed since the marriage bond. In the prenuptial agreement, the parties cannot predict agreements that relieve them of the contribution of the family in the interests of family development, but they can regulate the modalities of fulfilling the obligation.

The prenuptial agreement is a formal act where subjects are two spouses, which are physical persons of opposite sex. This contract is a solemn act and a statute for the future family. The necessary conditions for concluding a prenuptial agreement are the consent of the spouses, the cause of the contract, the object forming the subject of the contract and the form required by the law. These conditions are cumulative.

From all this paper the final result is that the contractual regime provides a kind of tranquility and security in the sense that it protects and provides reciprocal advantages between spouses in terms of material aspects. But when spouses do not own real estate or have no other assets, but have a minimum income to develop their livelihood then it is not recommended to make a prenuptial agreement to share their modest income.

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